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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Civil Action No. 3:04 CV 2075 (JCH) |
| GLOBAL NAPS, INC., *et al.*, | ) | |
| Defendants. | ) | JULY 25, 2008 |

**MOTION FOR STAY OF ENFORCEMENT OF JUDGMENT PENDING DISPOSITION OF MOTIONS**

Defendants, Global NAPs, Inc., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., and Ferrous Miner Holdings, Ltd. (collectively, "Defendants"), hereby move for Stay of Enforcement of the Default Judgment and Amended Judgment entered by this Court on July 7, 2008 and July 9, 2008 respectively pending a Motion for Reconsideration. In support thereof, Defendants submit a Memorandum of Law and declarations of Frank Gangi, Janet Lima and Samuel Zarzour and state the following:

1. A Default Judgment was entered by this Court on July 7, 2008 in the amount of $5,247,781.45 and an award of fees and costs of $645,760.41 (the "Judgment") [Dkt. # 796].

2. An Amended Default Judgment was entered on July 9, 2008 [Dkt. # 806].

3. On July 8, 2008, Defendants filed Motions for Reconsideration of the rulings on which Default Judgment was based [Dkt. ## 797 and 800]. On July 9, 2008, Defendants filed Motions for Reconsideration of the amended and second amended rulings on which the Amended Default Judgment is based [Dkt. ## 807 and 808]. On July 10, 2008, Defendants filed Motions to Alter or Amend the Amended Judgment and Judgment [Dkt. ## 809 and 810].





**ORAL ARGUMENT REQUESTED**

4. F.R.C.P. 62(b) provides the Court with discretion to issue a stay of execution of any proceedings to enforce a judgment pending the disposition of pending motions. For the reasons set forth herein, this Court should stay enforcement of the Default Judgment entered July 7, 2008 and the Amended Default Judgment entered July 9, 2008 pending its determination of Defendants' motions, on the condition that Defendants give notice prior to selling or encumbering any of Defendants' property and retain any revenues in excess of amounts needed to pay operating expenses (including employee compensation and benefits, maintenance and other expenses, rent, and utilities), legal expenses, taxes, and other routine expenses.

WHEREFORE, Defendants respectfully request this Court enter an Order Staying execution of the Default Judgment and Amended Default Judgment pending a determination of their Motions for Reconsideration and to Alter or Amend the Judgments.

Dated: Stamford, Connecticut
July 25, 2008

GLOBAL NAPS, INC., GLOBAL NAPS NEW HAMPSHIRE, INC., GLOBAL NAPS NETWORKS, INC., GLOBAL NAPS REALTY, INC., AND FERROUS MINER HOLDINGS, LTD.

By:/s/Eric C. Osterberg
Eric Osterberg (ct22679)
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**CERTIFICATE OF SERVICE**

I certify that on July 25, 2008 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Eric C. Osterberg
Eric C. Osterberg

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Civil Action No. 3:04 CV 2075 (JCH) |
| GLOBAL NAPS, INC., *et al.*, | ) | |
| Defendants. | ) | JULY 25, 2008 |

**MEMORANDUM IN SUPPORT OF MOTION TO STAY EXECUTION OF JUDGMENT PENDING DISPOSITION OF MOTIONS**

Defendants, Global NAPs, Inc., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., and Ferrous Miner Holdings, Ltd. (collectively, "Defendants"), respectfully submit this Memorandum of Law in Support of their Motion to Stay Execution of Judgment Pending Determination of their Motions for Reconsideration [Dkt. ## 797, 800, 807 and 808] and to alter or amend the amended judgment and judgment [Dkt. ## 809 and 810].

F.R.C.P. 62(b) provides the Court with discretion to issue a stay of execution of any proceedings to enforce a judgment pending the disposition of such motions. For the reasons set forth herein, this Court should stay enforcement of the Default Judgment entered July 7, 2008 and the Amended Default Judgment entered July 9, 2008 pending its determination of Defendants' motions, on the condition that Defendants give notice prior to selling or encumbering any of Defendants' property and retain any revenues in excess of amounts needed to pay operating expenses (including employee compensation and benefits, maintenance and other expenses, rent, and utilities), legal expenses, taxes, and other routine expenses.

## I. PROCEDURAL HISTORY

On July 7, 2008, this Court entered a Default Judgment against Global NAPs, Inc. in the amount of $5,247,781.45 and awarded fees and costs of $645,760.41 [Dkt. # 796]. On July 9, 2008, the Court entered an Amended Default Judgment [Dkt. # 806]. On July 8, 2008, Defendants filed Motions for Reconsideration of the rulings on which the Default Judgment was based [Dkt. ## 797 and 800]. On July 9, 2008, Defendants filed motions for reconsideration of the amended and second amended rulings on which the Amended Default Judgment is based [Dkt. ## 807 and 808]. On July 10, 2008, Defendants filed motions to alter or amend the Amended Judgment and Judgment [Dkt. ## 809 and 810]. This Court has not yet ruled on any of Defendants' motions.

## II. ARGUMENT

### A. The Court Should Grant A Stay Pending Disposition of the Motions

F.R.C.P. 62(b) provides that after the entry of judgment, the district court has discretion to order a stay while it considers a motion for reconsideration or motion to alter or amend a judgment.[1] Specifically, F.R.C.P. 62(b) provides:

> On appropriate terms for the opposing party's security, the court may stay the execution of a judgment – or any proceedings to enforce it – pending disposition of any of the following motions: . . . (3) under Rule 59, for a new trial or to alter or amend a judgment; . . .

The factors courts consider when evaluating whether a stay should be granted are:

> (1) whether the stay applicant has made a strong showing that he or she is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;

[1] Case law is clear that a timely motion for reconsideration is treated as a motion to alter or amend the judgment under Rule 59. 12 MOORE'S FEDERAL PRACTICE – CIVIL § 59.30 (2008); *McCowan v. Sears, Roebucks and Co.*, 908 F.2d 1099, 1103-1104 (2d Cir. 1990); *Northwestern Nat. Ins. Co. of Milwaukee, Wisconsin v. Alberts*, 937 F.2d 77, 82 (2d Cir. 1991).

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and

(4) where the public interest lies.

MOORE'S FEDERAL PRACTICE – CIVIL §308.40. *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999); *Cooper v. Town of East Hampton*, 83 F.3d 31, 36 (2d Cir. 1996). Each of those factors favors granting a stay in this instance.

**1. Defendants are Likely to Succeed on the Merits**

As fully set forth in Defendants' motions for reconsideration and to alter and amend the judgments, there are compelling reasons to vacate those judgments. The default judgments against Defendants were based on testimony from Sheila Gangi that she has subsequently recanted, and inferences from that testimony which Defendants have shown to be incorrect (Memo in Support of Motion to Alter or Amend Judgments [Dkt. # 810] at 10-13); the alleged failure to produce a comprehensive general ledger which Defendants have shown did not exist (*id.* at 5-7); with respect to all the veil piercing Defendants, actions not attributable to them and pre-dating their involvement in the case (*id.* at 13-15); and with respect to Ferrous Miner, an incorrect finding that it had not produced documents when in fact it had done so. (Mem. in Support of Motion to Alter or Amend Judgments [Dkt. # 809] at 1-4.) The foundation of the default judgment awards has been thoroughly eroded so that the judgment should not stand or, at minimum, only lesser sanctions are appropriate. For these reasons, Defendants are likely to succeed on the merits of their motions for reconsideration and alter and amend the Judgments.

**2. Defendants Will Be Irreparably Injured Absent A Stay**

As shown in the declaration of Frank Gangi, Defendants' assets fall into two categories, cash in their bank accounts, and telecommunications equipment. If Defendants lose either their

money or their equipment, they will be unable to continue operations. Obviously, Defendants' need their telecommunications equipment to continue to provide telecommunications services to their customers. Furthermore, Defendants' business is a "cash in, cash out" business, and one that is not nearly as profitable as it was once. Their bank accounts fill when customers pre-pay, and then delete shortly thereafter when they pay employees, operating expenses, and legal fees. (Gangi Decl. ¶¶ 3,8, Ex. A; Lima Decl. ¶ 3, Ex. B.) If SNET is permitted to levy on those accounts, Defendants' will be unable to pay those operating expenses, and similarly be unable to continue business.

### 3. Issuance of a Stay Will Not Harm SNET

Defendants propose to be bound not to transfer or encumber any assets subject to enforcement without notice to SNET pending disposition of the motions. Defendants' cash flow is consistent, similar amounts flow in each month from customers and then flow out to pay employees and suppliers. (Gangi Decl. ¶¶ 3, 8, Ex. A; Lima Decl. ¶¶ 3, 5, Ex. B.) If SNET levies on Defendants' bank accounts, that will be a one time event, resulting in a similar recovery, regardless of when it occurs. SNET will freeze the accounts, then Defendants will be unable to pay their employees and vendors, and the businesses will close promptly, regardless of the month. Similarly, Defendants' telecommunications equipment already has been used, and thus will not experience a significant loss of market value in the time it takes the Court to rule on the motions. (Gangi Decl. ¶ 4, Ex. A.)

In sum, Defendants' pledge not to transfer or encumber assets, other than performing normal maintenance and paying normal expenses (wages and benefits, utilities, maintenance costs, legal fees etc.) will preserve the status quo with respect to SNET's ability to collect.

### 4. The Public Interest Favors A Stay

The most compelling public interest relating to this case is in competition in the telecommunications industry as envisioned in the Telecommunications Act. At present, there are few competitive Local Exchange Carriers operating in the territories in which Defendants' operate. If SNET is permitted to execute upon Defendants' assets while the motions are pending, it could cripple Defendants' ability to route telecommunications traffic, and disrupt Defendants' ability to pay suppliers, employees, utility providers, and other vendors, ultimately destroying Defendants' business and leaving Defendants' customers with one less choice in telecommunications providers. In contrast, if SNET is prohibited from executing on the judgments until the Court rules upon the motions, Defendants' will continue in business, offering one more alternative in a shrinking field of telecommunications providers.

## B. The Court Should Not Require A Bond

Rule 62(b) provides that the district court may condition the stay on the provision of "[o]n appropriate terms for the opposing party's security," but is not required to do so. F.R.C.P. 62(b). The rule does not specify what conditions are "appropriate" or state that security is required.[2] Therefore, the Court has considerable flexibility in determining whether security is necessary. *See e.g., Federal Prescription Services, Inc. v. American Pharmaceutical Ass'n*, 205 U.S. App. D.C. 47, 636 F.2d 755 (D.C. Cir. 1980) (holding that under Rule 62(d), court may "order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery"); *In re Apollo Group Inc. Securities Litigation*, 2008 WL

[2] Prior to Amendments enacted in 2007, Rule 62(b) stated that courts could issue a stay of a judgment on "such conditions for the security of the adverse party as are just and proper...." *See, e.g., Int'l Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212, 216 (D. S.C. 1984). The shift from "proper" to "appropriate" was intended only as a "general restyling of the Civil Rules" and was "intended to be stylistic only." F.R.C.P. 62, Committee Notes to the 2007 Amendment.

410625 (D. Ariz. 2008)(same); *Slip N' Slide Records, Inc. v. Teevee Toons, Inc.*, 2007 WL 1489810 (S.D. Fla. 2007)("amount of [the] security under the circumstances is something the Court can adjust").

As the court observed in *International Wood*:

> A stay pending disposition of a [motion for reconsideration of a judgment] will generally be resolved in far less time than the lengthy process of briefing, argument and disposition which an appeal entails. Consequently, the risk of an adverse change in the status quo is less when comparing adequate security pending post-trial motions with adequate security pending appeal. It is also significant that prior to an appeal the district court has plenary power to alter, amend or reopen the judgment. . .

102 F.R.D. at 216; *see also Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals, Inc.*, 2006 WL 2034577, *1 (W.D. Wis. 2006)(citing *Int'l Wood* for proposition that "security risks generally prompting requirement for bond are less when stay pertains to post-trial motions and not appeal because post-trial motions are generally resolved in less time").

"If an unsecured stay is to be granted, the burden is on defendants to demonstrate affirmatively that posting a bond or otherwise providing adequate security is impossible or impractical." *Id.* at 214; *Frankel v. ICD Holdings S.A.*, 168 F.R.D. 19, 22 (1996)("a court faced with such an application ought to consider the justification offered for granting a stay absent security as well as the movant's financial position"). Here, Defendants have met that burden. Defendants' bank account statements reveal their cash flow, which is roughly equivalent to their operating expenses. The declaration of Janet Lima reveals the types of assets available to satisfy SNET's judgment, cash flow and telecommunications equipment. (The declaration of Samuel Zarzour reveals that Defendants have sought a bond, but cannot qualify because they do not possess sufficient cash or its equivalent. (Zarzour Decl., Ex. C.))

This case is similar to that of *C. Albert Sauter Co., Inc. v. Richard S. Sauter Co, Inc.*, 368 F. Supp. 501 (D. Pa. 1973). In that case, as here, the defendants were without sufficient assets to

satisfy the judgment and execution of the judgment would have placed the defendants in insolvency. 368 F. Supp. at 520. To avoid destroying the corporate defendants' ability to function as a going concern, the court entered the stay without requiring a bond, on conditions that defendants' stock be placed in escrow, that defendants maintain the value of their assets, that defendants pay only necessary operating expenses, and that plaintiff be allowed to audit defendants' monthly financial statements

As explained above, Defendants have a strong case for reconsideration and if Defendants are forced to post bond the status quo would be harmed. Particularly because, in addition to the errors concerning the default, there is substantial authority for the proposition that the Court lacked subject matter jurisdiction, the Court should grant the stay subject to requiring Defendants to give notice prior to alienating or encumbering their equipment or other assets, and to retain any amounts received in excess of the amounts needed to pay expenses.

## CONCLUSION

For each and all of the foregoing reasons, Defendants respectfully request that this Court enter an Order staying execution on the Judgment and Amended Judgment pending a determination of their motions for reconsideration and to alter or amend the judgments.

Dated: Stamford, Connecticut
July 25, 2008

GLOBAL NAPS, INC., GLOBAL NAPS NEW HAMPSHIRE, INC., GLOBAL NAPS NETWORKS, INC., GLOBAL NAPS REALTY, INC., AND FERROUS MINER HOLDINGS, LTD.

By:/s/Eric C. Osterberg
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Joseph M. Pastore III (ct11431)
Michael R. Patrick (ct26556)
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Stamford, CT 06901
Phone: (203) 425-9500
Fax: (203) 425-9595

## CERTIFICATE OF SERVICE

I certify that on July 25, 2008 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Eric C. Osterberg
Eric C. Osterberg

# EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Civil Action No. 3:04 CV 2075 (JCH) |
| GLOBAL NAPS, INC., GLOBAL NAPS NEW HAMPSHIRE, INC., GLOBAL NAPS NETWORKS, INC., GLOBAL NAPS REALTY, INC., AND FERROUS MINER HOLDINGS, LTD., | ) | |
| Defendants. | ) | JULY 25, 2008 |

**DECLARATION OF FRANK GANGI IN SUPPORT OF DEFENDANTS' MOTION TO STAY ENFORCEMENT OF DEFAULT JUDGMENT**

I, Frank Gangi, declare:

1. I am the President of Global NAPs, Inc., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc. and Ferrous Miner Holdings, Ltd. (collectively "Defendants").

2. The assets of Global NAPs, Inc. primarily consist of certain telecommunications licenses and interconnection agreements, a roughly $26 million acknowledged debt from Verizon that Verizon currently is asserting as an offset against disputed claims asserted by it against Defendants, and certain monies deposited the bank in of Global NAPs New Hampshire, Inc. Global NAPs, Inc. also has a "zero balance" bank account in which monies are deposited to pay current debts accrued in the ordinary course of business and in litigation and then immediately paid out to satisfy those debts.

3. The principal asset of Global NAPs New Hampshire, Inc. is a bank account with TD BankNorth into which monies belonging to the "Global" defendants (Inc., Realty and Networks) are deposited. The balance of that account rises when customers prepay for services (approximately $1 million per month) and falls substantially when money promptly is disbursed to service and facilities providers and to other Global entities to pay their bills.

4. The assets of Global NAPs Networks, Inc. consist of certain telecommunications equipment used in the Global NAPs Networks telecommunications network. Much of that equipment is Sycamore equipment, the majority purchased used. The value of that equipment is likely only salvage value both because it is used and I believe that Global NAPs is the only company of which it is aware that uses the Sycamore equipment. Networks also is the owner of certain monies deposited in the Global NAPs New Hampshire, Inc. bank account, and a "zero balance" account.

5. The assets of Global NAPs Realty, Inc. consist of certain telecommunications "huts" and co-location facilities and a "zero balance" account.

6. The assets of Ferrous Miner Holdings, Ltd. ("Ferrous Miner") consist of approximately $674 in its own bank account, and stock in Global NAPs, Inc., Global NAPs Networks, Inc., Global NAPs New Hampshire, Inc. Ferrous Miner also owns stock in various other companies which either exist solely to hold telecommunications licenses or serve no function. The total liquid assets of those entities are in the form of bank deposits. There is less than $5,000 total on deposit in those entities' accounts.

7. Depending on the outcome of certain FCC and state regulatory proceedings Defendants may have claims against Verizon and AT&T in excess of $200 million for payments wrongfully withheld.

8. Defendants' businesses currently operate as "cash in, cash out." Customers prepay for services each month. When that money comes in, it is used to pay wages and expenses. One of their largest variable expenses currently is legal bills. The size of those bills currently is largely determinative of whether defendants are profitable or break even in any given month. If SNET executes on Defendants' accounts, Defendants, like any other business without hordes of cash, no longer will have sufficient cash flow to pay employees, utilities, etc. and will have significant difficulty sustaining operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 25, 2008.

Frank Gangi

## CERTIFICATE OF SERVICE

I certify that on July 25, 2008 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Eric C. Osterberg
Eric C. Osterberg

# EXHIBIT B

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Civil Action No. 3:04 CV 2075 (JCH) |
| GLOBAL NAPS, INC., GLOBAL NAPS NEW HAMPSHIRE, INC., GLOBAL NAPS NETWORKS, INC., GLOBAL NAPS REALTY, INC., AND FERROUS MINER HOLDINGS, LTD., | ) | |
| Defendants. | ) | JULY 25, 2008 |

**DECLARATION OF JANET LIMA IN SUPPORT OF DEFENDANTS' MOTION TO STAY ENFORCEMENT OF DEFAULT JUDGMENT**

I, Janet Lima, declare:

1. My company, Select & Pay is the bookkeeper for Global NAPs, Inc., Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc. (collectively "Defendants"). I am the person principally responsible for doing the work.

2. . Global NAPs, Inc. has a "zero balance" bank account in which monies are deposited to pay current debts accrued in the ordinary course of business and in litigation and then immediately paid out to satisfy those debts.

3. Global NAPs New Hampshire, Inc. has a bank account with TD BankNorth into which monies belonging to the "Global" defendants (Inc., Realty and Networks) are deposited. The balance of that account rises when customers prepay for services (approximately $1 million per month) and falls substantially when money promptly is disbursed to service and facilities providers and to other Global entities to pay their bills.

4. Ferrous Miner Holdings, Ltd. ("Ferrous Miner") has approximately $674 in its own bank account.

5. Defendants' businesses currently operate as "cash in, cash out." Customers prepay for services each month. When that money comes in, it is used to pay wages and expenses. One of their largest variable expenses currently is legal bills. The size of those bills currently is largely determinative of whether defendants are profitable or break even in any given month. If SNET executes on Defendants' accounts, Defendants like any other business will no longer have sufficient cash flow to pay employees, utilities, etc. and will have significant difficulty sustaining operations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on July 25, 2008.

Janet Lima

# EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, | ) | |
| Plaintiff, | ) | |
| vs. | ) | Civil Action No. 3:04 CV 2075 (JCH) |
| GLOBAL NAPS, INC., GLOBAL NAPS NEW HAMPSHIRE, INC., GLOBAL NAPS NETWORKS, INC., GLOBAL NAPS REALTY, INC., AND FERROUS MINER HOLDINGS, LTD., | ) | |
| Defendants. | ) | JULY 22, 2008 |

**DECLARATION OF SAMUEL ZARZOUR IN SUPPORT OF DEFENDANTS' MOTION TO STAY ENFORCEMENT OF DEFAULT JUDGMENT**

I, Samuel Zarzour, declare:

1. I am an attorney in the Global NAPs, Inc. legal department.

2. Following entry of the default judgment against Global NAPs, Inc. and the other Defendants, I attempted to engage a bonding company to post a supersedeas bond on behalf of Defendants for the amount of the default judgment.

3. On July 11, 2008, I contacted Northeast Surety, LLC, a bonding company located in Farmington, Connecticut and spoke with Kenneth Coco, the managing member. He explained to me that he had thirty years experience and was very familiar with the process of appeal bonds. I had follow-up conversations with him again on July 14 and 15.

4. Mr. Coco explained that there are about ten bonding companies that have the ability to give a bond in the amount necessary in this matter and that his company acts as broker for all of them.

5. Mr. Coco informed me that all of the bonding companies he represents would require submission of the following:

i. Financial statements for each Defendant and very likely for all the affiliates of the Defendants as well, as of the end of fiscal year 2007, prepared by a CPA.

ii. A recent financial statement for the ultimate individual shareholder of the parent, Ferrous Miner Holdings, Ltd., prepared by a CPA.

iii. Indemnification agreements executed by all the Defendants, the ultimate individual shareholder and very likely by all the affiliates of the Defendants as well.

iv. Cash or its equivalent (e.g. letter of credit) in the full amount of the bond as collateral. Real estate or other fixed assets, such as telecommunications equipment, are not acceptable.

v. Copies of certain pleadings.

6. I informed Mr. Coco that I believe that the Defendants do not have the required amount of cash or the equivalent, nor the means to secure a letter of credit for the full amount of the judgment. I specifically asked Mr. Coco if it would be possible to obtain a bond on a portion of the value of the non-cash assets. He advised that without cash or its equivalent, that it was very unlikely that the Defendants could obtain a bond in any amount.

7. Based on the foregoing, and what appears to be a universal requirement that Defendants' demonstrate cash assets as a condition of any bond or loan, it is apparent that Defendants will be unable to post a bond in the full amount of the default judgment, or even for a portion of the amount.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 22, 2008.

Samuel Zarzour

# UNPUBLISHED AUTHORITY

**H**

In re Apollo Group Inc. Securities Litigation
D.Ariz.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Arizona.
In re APOLLO GROUP INC. SECURITIES LITIGATION,
This Document Relates To: All Actions.
**Master File No. CV 04-2147-PHX-JAT.**
**Nos. CV 04-2204-PHX-JAT, CV 04-2334-PHX-JAT.**

Feb. 13, 2008.

Robert D. Mitchell, Mitchell & Forest, Francis Joseph Balint, Jr, Kathryn Ann Jann, William G. Fairbourn, Bonnett Fairbourn Friedman & Balint PC, Rosemary Joy Shockman, Shockman Law Office PC, Phoenix, AZ, Patrick Joseph Coughlin, Ramzi Abadou, William Shannon Lerach, Coughlin Stoia Geller Rudman & Robbins Llp, Marc M. Umeda, Robbins Umeda & Fink LLP, Samuel M. Ward, Stephen Richard Basser, Barrack Rodos & Bacine, San Diego, CA, Stephen G. Schulman, Milberg Weiss Bershad & Schulman LLP, New York, NY, Jeffrey A. Barrack, John L. Haeussler, Leonard Barrack, Mark R. Rosen, William J. Ban, Barrack Rodos & Bacine, Philadelphia, PA, for Plaintiff.
Christopher B. Campbell, Dalena Marie Marcott, Jared M. Toffer, Jason W. Glicksman, Jessica A. Taggart, Joseph P Busch, Iii, Mark T Pollitt, Maura M Logan, Wayne Warren Smith, Kristopher Price Diulio, Gibson Dunn & Crutcher LLP, Irvine, CA, Daniel P. Muino, Gibson, Dunn & Crutcher LLP, San Francisco, CA, David B. Rosenbaum, Maureen Beyers, William J. Maledon, Osborn Maledon PA, James R. Condo, Joel Philip Hoxie, Joseph G. Adams, Snell & Wilmer LLP, Phoenix, AZ, for Defendant.

**ORDER**

JAMES A. TEILBORG, District Judge.
***1** Pending before the Court is Defendants' Motion for Stay of Execution Pending Disposition of All Post-Trial Motions. This motion raises two issues: (1) whether a bond is necessary to adequately secure the judgment during the pendency of all post-trial motions; and (2) if so, what amount will adequately secure the judgment.

**I. Background**

On January 30, 2008, this Court entered judgment jointly and severally against Defendants in an amount up to $5.55 per share for all qualifying shares. Because of the per-share nature of the damages, the total amount of this judgment will not be known until the claims process is completed. Defendants estimate that their total potential liability under the judgment, including prejudgment interest, is $190.2 million. Although Lead Plaintiff "strongly disputes" this estimate, the only alternative they offer is to hold Defendants to their damages estimate at trial. That estimate amounted to $300 million. The Court, however, is unaware of any legal authority that would require Defendants to secure a judgment that does not exist. Thus, for the purposes of this Order, the Court estimates the value of the judgment, plus prejudgment interest, at $190.2 million.

**II. Legal Standard and Discussion**

Rule 62(b) of the Federal Rules of Civil Procedure allows a federal court to "stay the execution of a judgment" pending disposition of certain post-trial motions. Such a stay can only be granted "[o]n appropriate terms for the opposing party's security."*Id.* An unsecured stay is disfavored under Rule 62(b).*See, e.g., Int'l Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212, 214 (D.S.C.1984) ("Rule 62, taken in its entirety, indicates a policy against any unsecured stay of execution after the expiration of the time for filing a motion for a new trial.") (citing cases). Nevertheless, while security should be provided "in normal circumstances," a

district court in its discretion may grant an unsecured stay in "unusual circumstances," where the granting of such a stay will not "unduly endanger the judgment creditor's interest in ultimate recovery."*Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n,* 636 F.2d 755, 760-61 (D.C.Cir.1980) (addressing stay pending appeal pursuant to Rule 62(d)); *see also In re Combined Metals Reduction Co.,* 557 F.2d 179, 193 (9th Cir.1977) (recognizing district court's discretion to grant unsecured stay under Rule 62(d)).[FN1]

> FN1. Some courts have held that an unsecured stay should only be granted when the judgment debtor demonstrates that providing security is "impossible or impractical." *E.g., Int'l Wood Processors,* 102 F.R.D. at 214;*Gallatin Fuels v. Westchester Fire Ins. Co.,* No. 02-CV-2116, 2006 WL 952203, at *2 (W.D.Pa.2006); *Frankel v. ICD Holdings S.A.,* 168 F.R.D. 19, 22 (S.D.N.Y.1996). The Court, however, does not find these authorities persuasive. Such a standard would be more restrictive than the standard applied to unsecured stays pending appeal under Rule 62(d).*Cf. Fed. Prescription,* 636 F.2d at 759 (focusing on the judgment debtor's financial condition as a factor that can weigh in favor of granting an unsecured stay). If anything, due to the greater risk inherent in the longer stay under Rule 62(d), the standard governing the court's discretion in the Rule 62(b) context should be less restrictive.

Defendants argue that Apollo Group, Inc.'s present ability to satisfy the judgment and its financial stability over the past five years demonstrate that Lead Plaintiff's interest in the judgment is adequately protected without security. To support their position, Defendants cite *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n.*There, the D.C. Circuit upheld a district court's decision to grant an unsecured stay pending appeal under Rule 62(d), in part because the judgment debtor's net worth was about forty-seven times the amount of the damages award. 636 F.2d at 761.By contrast, Apollo's total assets ($1.2 billion) are only about six times the estimated damages award in this case ($190.2 million). The Court therefore is unconvinced that Lead Plaintiff's interest is adequately protected without security.

***2** The remaining issue the Court must decide is the amount of security necessary to protect Lead Plaintiff's interest. The purpose of security under Rule 62(b) is to preserve the status quo pending disposition of post-trial motions. *Int'l Wood Processors,* 102 F.R.D. at 215. Accordingly, courts typically require security in the full amount of the judgment. *Id.* at 215-16 (setting bond at full amount of judgment plus three months' interest); *Gallatin Fuels,* 2006 WL 952203 at *2 (setting bond at full amount of judgment); *Frankel,* 168 F.R.D. at 22 (setting bond at 110% of amount of judgment). On the basis of this general rule, Lead Plaintiff argues that security in the amount of nothing less than Defendants' estimated potential liability ($190.2 million) would adequately protect its interest in the judgment.

Unlike the cases cited above, however, the damages awarded in this case are on a per-share basis rather than a lump-sum basis. Thus, the amount of the judgment is uncertain. In light of this uncertainty, Defendants argue that the amount of the security should be based on their estimated *actual* liability, measured by the estimated percentage of potential claimants who will actually file a claim during the claims process. Defendants contend that it is unrealistic to expect one hundred percent of the potential claimants to file a claim. In support of their argument, Defendants cite a 2002 study that suggests that only twenty-three to thirty-three percent of potential institutional claimants in securities-fraud class actions actually file a claim. *See* James D. Cox & Randall S. Thomas, *Leaving Money on the Table: Do Institutional Investors Fail to File Claims in Securities Class Actions?,* 80 Wash. U.

L.Q. 855, 877 (2002). On the basis of this study, Defendants urge the Court to require security in the amount of either twenty-five or fifty percent of their estimated potential liability, which would amount to $47.5 million or $95 million.[FN2]

> FN2. Defendants offer the alternative of fifty percent to account for any errors in the study.

The Court finds Defendants' argument persuasive and concludes that security in the amount of $95 million adequately protects Lead Plaintiff's interest. First, the Court agrees that it is unrealistic to expect one hundred percent of the potential claimants in this case to actually file a claim. Second, although there is inherent uncertainty in using historical trends as predictors of the future, such studies are commonly relied on in today's society as indicators of future behavior. Third, the Court is confident that Defendant Apollo's financial position adequately protects Lead Plaintiff's interest to the extent that security in the amount of fifty percent of Defendants' estimated potential liability only partially secures the judgment.

**III. Conclusion**

Accordingly,

**IT IS THEREFORE ORDERED** that Defendants' Motion for Stay of Execution Pending Post-Trial Motions (Doc. # 513) is granted. Defendants are granted an unsecured stay that will expire at 5:00 p.m. on Tuesday, February 19, 2008, unless before that time Defendants post a bond in the amount of $95 million with the Clerk of the Court.

D.Ariz.,2008.
In re Apollo Group Inc. Securities Litigation
Slip Copy, 2008 WL 410625 (D.Ariz.)

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Slip N' Slide Records, Inc. v. Teevee Toons, Inc.
S.D.Fla.,2007.
Only the Westlaw citation is currently available.

United States District Court,S.D. Florida.

SLIP N' SLIDE RECORDS, INC., Plaintiff,
v.
TEEVEE TOONS, INC., d/b/a TVT Records, LLC, Defendant.
Teevee Toons, Inc., Counterclaimant,
v.
Slip N' Slide Records, Inc.; Rude Bwoy Entertainment; 305 Music; Alan Waserstein; Robert Henderson; and Theodore Lucas., Counterdefendants.

**No. 05-21113-Civ-TORRES.**

May 18, 2007.

David Michael Rogero, Coral Gables, FL, Mark Alexander Goldstein, Richard Charles Wolfe, Wolfe & Goldstein, Miami, FL, for Plaintiff and Counterdefendants.
Manuel Kushner, Kaye Scholer, West Palm Beach, FL, Mark D. Godler, Kaye Scholer Fierman Hays & Handler, New York, NY, Peter L. Haviland, Kaye Scholer LLP, Los Angeles, CA, for Defendant.

***ORDER GRANTING IN PART AMENDED MOTION TO STAY EXECUTION OF JUDGMENT PENDING POST-TRIAL MOTIONS***

EDWIN G. TORRES, United States Magistrate Judge.

***1** This Order follows from the Court's earlier Order entered April 10, 2007 [D.E. 458] that temporarily stayed execution matter in response to Teevee Toons, Inc.'s ("TVT") Motion [D.E. 455] for entry of a stay, under Fed.R.Civ.P. 62, of execution or any collection proceedings to enforce the judgment previously entered in this action. The April 10th Order continued the automatic 10-day stay to allow TVT to supplement the record and respond to the issues raised in the Order, as well as to allow Plaintiff to further respond to those arguments and the authorities cited in the Court's Order. TVT filed under seal its amended motion to stay execution [D.E. 463] that attached confidential financial documents in support of the motion. Plaintiff filed its response in opposition to the amended motion to stay [D.E. 469] to which TVT replied on April 26, 2007. [D.E. 474]. This matter is thus ripe for disposition.

1. TVT requests a stay on the execution of the Judgment until the Court rules on the Rule 50 and Rule 59 motions TVT filed on April 2, 2007. TVT argues that it believes it has very strong grounds to vacate or modify the Court's Judgment; that allowing enforcement of the Judgment, when the automatic stay provided in Fed.R.Civ.P. 62 and S.D. Fla. Local R. 62.1 expires, pending disposition of the post-trial motions would result in unnecessary prejudice to TVT based upon its current financial status; and that TVT does not presently believe it can obtain the security required under the Court's Rules. In response to the Court's April 10th Order, TVT has proffered that, in lieu of posting a bond for the total amount required by the Court's Rules, TVT consents to entry of an Order restraining it from entering into any transaction outside of the ordinary course of business, or otherwise disposing of any of its assets. According to TVT, its proffer in lieu of a bond "makes Plaintiff the beneficiary of the security provisions and financial constraints imposed upon TVT in the Loan Agreement."[D.E. 474]. To supplement the record, TVT filed for the Court's in camera review a complete copy of that loan agreement under which TVT currently is operating. TVT thus argues that by agreeing to be bound to those conditions as against Plaintiff in this matter TVT's ability to satisfy the eventual final judgment entered in this case is adequately preserved because TVT has more value as an ongoing concern. TVT questions whether its financial viability could be sustained if it had to satisfy the required bond amount or had to pledge assets to secure a continued stay of execution.

2. Plaintiff's response continues to oppose any stay of execution without the posting of the full amount of bond required under S.D. Fla. Local R. 62.1, which would be 110% of the total amount of the judgment. Plaintiff argues that TVT's supplemental proffer is insufficient given that TVT's claimed financial difficulties from the judgment are more reasons, not less, why a full bond should be posted to stay execution. Plaintiff adds that TVT gambled by pursuing this case all the way to verdict, notwithstanding its financial situation, rather than settling the case for much less than what the jury's verdict turned out to be.

*2 3. Under Rule 62(b), "[i]n its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b)." In this District, and unless the Court orders to the contrary, the standard security necessary to stay execution of a Judgment is a supersedeas bond in the amount of 110% of the Judgment amount, which must be filed within thirty (30) days after entry of Judgment. S.D. Fla. Local R. 62.1.

4. As explained in the earlier Order, the Court clearly has discretion to stay execution of a Judgment under Rule 62 pending disposition of a party's post-trial motions on whatever conditions the Court finds to be just. The Court has found, however, very little authority for entering such a stay without some security being posted. To the contrary, "Rule 62, taken in its entirety, indicates a policy against any unsecured stay of execution after the expiration of the time for filing a motion for a new trial."*International Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212, 214 (D.S.C.1984) (quoting *Marcelletti & Sons Constr. Co. v. Millcreek Township Sewer Auth.*, 313 F.Supp. 920, 928 (W.D.Pa.1970))."Thus, if an unsecured stay is to be granted, the burden is on the defendants to demonstrate affirmatively that posting a bond or otherwise providing adequate security is impossible or impractical."*International Wood,* 102 F.R.D. at 214 (denying motion to grant unsecured stay citing analogous Rule 62(d) cases); *see also Avirgan v. Hull,* 125 F.R.D. 185, 188 (S.D.Fla.1989).

5. Consequently, the purpose of the April 10th Order was to allow TVT the opportunity to show that, in the absence of standard security, plaintiff will be properly secured against the risk that the defendant will be less able to satisfy the judgment subsequent to disposition of the post-trial motions.*International Wood,* 102 F.R.D. at 214-15. Certainly, TVT's proffer that it be constrained from dissipating its assets pending resolution of the post-trial motions could be part of an alternative form of security. *See Miami Int'l Realty Co. v. Paynter,* 807 F.2d 871, 873-74 (10th Cir.1986) (affirming district court's waiver of bond requirement conditioned, in part, on Order prohibiting defendant from transferring, selling or otherwise disposing of his assets pending appeal). As TVT acknowledges, of course, it is already bound by that requirement under the loan agreement that it currently has with its lender. TVT's proffer is thus nothing more than a promise to do that which it is already required to do. The only difference is that, in addition to the loan agreement, that promise could be enforced by Plaintiff here through entry of an Order under Rule 62.

*3 6. This pledge to do what TVT is already required to do is not, by itself, enough to provide the type of security that Rule 62 contemplates. As the Tenth Circuit case that TVT itself cited, *Miami Int'l,* that pledge not to dissipate assets was accompanied with tangible security, in the form of the posting of a $500,000 insurance policy to secure a $2.1 million debt. *Id.* Here, by contrast, TVT's amended motion does not proffer any form of tangible security in addition to the pledge not to dis-

sipate assets. And, TVT has pointed to no authority holding such a pledge was enough, by itself, to stay execution of a substantial money judgment such as this one. To the contrary, the weight of authority clearly requires more than that to secure a judgment, *especially* in cases where a defendant's financial viability or liquidity is in doubt. *See, e.g., Frankel v. I.C.D. Holdings S.A.*, 168 F.R.D. 19, 22 (S.D.N.Y.1996) (denying motion to grant unsecured stay); *Aerospace Marketing, Inc. v. Ballistic Recovery Sys., Inc.*, 2005 WL 2057404 (M.D.Fla. Aug.23, 2005) (denying unsecured stay pending resolution of post-trial motions) (citing *Poplar Grove Planting & Refining Co. ., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir.1979) (generally courts should require full security where an unconditional money judgment is stayed)).

7. As we explained before, however, the amount of that security under the circumstances is something the Court can adjust. *International Wood,* 102 F.R.D. at 215 (proper security under Rule 62(b) is distinct from security required for appeal under Rule 62(d) as risks involved are different and only reasonable security is required). Plaintiff does not address this issue in any detail in its response, notwithstanding the Court's April 10th Order. Plaintiff is perhaps being short-sighted in this manner because, taking TVT at its word that it financial cannot secure a complete bond in this case, if no stay is issued in the case and TVT is forced to seek bankruptcy court protection before the post-trial and appellate process is complete Plaintiff's ability to collect on its judgment would be even more jeopardized. And, Plaintiff forgets, again, that a stay of execution during the post-trial motion phase of a case is different from a stay for plenary appeal.

8. Therefore, the Court is faced with two untenable positions presented by the parties. To resolve this problem, therefore, the Court has considered TVT's chances of ultimate success in this matter, Plaintiff's right to adequate security under Rule 62, TVT's likely financial ability to secure tangible security, and the Court's interest in preserving the status quo pending complete resolution of the post-trial motions in the case. Upon considering these factors, the Court concludes that a 110% bond on the full amount of the judgment is not required, as per *International Wood.*To preserve the status quo in the case, and taking into account TVT's financial condition, the Court will require the pledge not to dissipate assets *in addition* to the posting as security of 100% of the compensatory damage portion of the judgment, $2,279,200. That security can be in the form of a surety bond, the posting of cash in escrow, or a secured pledge of assets that are not already encumbered. The Court recognizes, of course, that under its current loan obligations TVT's ability to satisfy this security requirement will be limited, if at all, to a surety bond. But the other options are available to TVT if its circumstances change.

***4** 9. TVT will also be granted additional time to obtain the required security. The Court will thus continue the stay currently in effect through May 30, 2007. If adequate security is not posted by that point, the stay of execution will expire on that date without further Order of the Court.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Defendant's Amended Motion to Stay Execution of Judgment is **GRANTED IN PART AND DENIED IN PART** in accordance with this Order.

**DONE AND ORDERED.**

S.D.Fla.,2007.
Slip N' Slide Records, Inc. v. Teevee Toons, Inc.
Slip Copy, 2007 WL 1489810 (S.D.Fla.)

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Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals, Inc.
W.D.Wis.,2006.
Only the Westlaw citation is currently available.

United States District Court,W.D. Wisconsin.
WISCONSIN ALUMNI RESEARCH FOUNDATION, Plaintiff,
v.
XENON PHARMACEUTICALS, INC., Defendant.
**No. 05-C-242-C.**

July 18, 2006.

Anthony A. Tomaselli, for Plaintiff.
John Mitchell Jones, Medlen & Carroll LLP, Madison, WI, for Defendant.

OPINION AND ORDER

BARBARA B. CRABB, District Judge.
*1 On May 25, 2006, this court entered judgment in this case, following the disposition of the parties' cross motions for summary judgment and a jury trial on the question of damages. On June 9, 2006, defendant Xenon Pharmaceuticals, Inc. filed a motion to stay execution or enforcement of judgment pending disposition of defendant's post-trial motions. The court granted defendant's motion on June 14, 2006, dkt. # 204, before plaintiff Wisconsin Alumni Research Foundation had an opportunity to respond to the motion. Presently before the court is plaintiff's motion for reconsideration of the June 14 order granting defendant's motion.

Because the court jumped the gun when it ruled on defendant's motion before plaintiff had an opportunity to respond, I will treat plaintiff's present submissions not as a motion to reconsider (where plaintiff could prevail only if it showed that the court erred in its prior ruling), but rather as a response to defendant's motion to stay execution or enforcement of judgment. I conclude that neither of plaintiff's arguments (that defendant should be required to post a bond and that the court should amend the stay to allow plaintiff to terminate the Exclusive License Agreement) is persuasive. The stay imposed on June 14, 2006, will remain in force as entered.

A. *Requirement to Post Bond*

When a court stays the execution or enforcement of a judgment pursuant to Fed.R.Civ.P. 62(b), it has discretion to set the conditions of the stay.Fed.R.Civ.P. 62(b) ("In its discretion and on such conditions for the security of the adverse party as are proper ...."). One of the conditions the court may impose is the requirement that the party requesting the stay post a bond to secure its payment of the judgment under challenge. I will not require defendant to post a bond as a condition of the stay entered in this case because the bond would be in effect for an extremely brief period (defendant's post-trial motions are presently under advisement and the court expects to rule on the motions promptly) and I am satisfied that defendant's ability to pay the judgment entered against it will not materially change from the time judgment was entered to the time the post-trial motions are disposed of. *See, e.g., International Wood Processors v. Power Dry, Inc.*, 102 F.R.D. 212, 215 (D.S.C.1984) (security risks generally prompting requirement for bond are less when stay pertains to post-trial motions and not appeal because post-trial motions are generally resolved in far less time).

B. *Stay on Termination of Exclusive License Agreement*

Plaintiff argues that the court cannot stay the termination of the Exclusive License Agreement for two reasons. First, plaintiff already terminated the agreement (on May 17, 2006, two weeks after the court issued a ruling on the summary judgment motions, dkt. # 147, in which it held that defendant had violated the agreement and plaintiff had the

right to terminate it, but before judgment was entered on May 25) and the court cannot stay an action that already occurred. Second, the termination clause of the Exclusive License Agreement does not require plaintiff to obtain permission from the court before it may terminate the agreement.

***2** Plaintiff's first argument is formalistic and without merit. Although the court cannot retroactively prevent plaintiff from terminating the agreement, it can certainly impose a stay on the termination so that it is not in effect as long as the stay is in force, or declare that the termination is void. Plaintiff's second argument is unpersuasive. It is undisputed that the agreement's termination clause does not require plaintiff to obtain permission from the court before it may terminate the agreement:

> If Xenon at any time defaults in the timely payment of any monies due to WARF or the timely submission to WARF of any Development Report, fails to actively pursue the Summary Development Plan, or commits any breach of any other covenant herein contained, and Xenon fails to remedy any such breach or default within ninety (90) days after written notice thereof by WARF, or if Xenon commits any act of bankruptcy, becomes insolvent, is unable to pay its debts as they become due, files a petition under any bankruptcy or insolvency act, or has any such petition filed against it which is not dismissed within sixty (60) days, or offers any component of the Licensed Patents to its creditors, WARF may, at its option, terminate this Agreement by giving notice of termination to Xenon.
>
> Exclusive License Agreement, Section 7.C.

Plaintiff is correct that prior to filing this lawsuit it did not need the court's permission to terminate the agreement. However, plaintiff filed this lawsuit, in part requesting declaratory judgment that defendant breached the Exclusive License Agreement and plaintiff may terminate it, Cpt., dkt. # 2, p. 14, ¶ 6. Having brought the court into this dispute, plaintiff cannot now claim that it can terminate the agreement regardless of the court's holding. Plaintiff appears to believe that it can elicit an advisory opinion from the court without having to follow the court's directives. It is wrong. For the time being the court has concluded that plaintiff *is* entitled to terminate the agreement. If the court grants defendant's post-trial motions, ultimately deciding that plaintiff may *not* terminate the agreement, plaintiff will be bound by that decision. Therefore, any attempted termination of the agreement that has already occurred is suspended until the court has ruled on the post-trial motions and plaintiff may not take renewed action to terminate the agreement until that time.

The stay imposed on June 14, 2006, is to remain in effect as entered. Plaintiff's motion for reconsideration will be denied.

ORDER

IT IS ORDERED that plaintiff Wisconsin Alumni Research Foundation's motion for reconsideration is DENIED.

W.D.Wis.,2006.
Wisconsin Alumni Research Foundation v. Xenon Pharmaceuticals, Inc.
Not Reported in F.Supp.2d, 2006 WL 2034577 (W.D.Wis.)

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## CERTIFICATE OF SERVICE

I certify that on July 23, 2008 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Eric C. Osterberg
Eric C. Osterberg